

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

REBECCA ELMORE.

Plaintiff,

V.

JOSEPH LEHMAN,

Defendant.

Case No. C05-5836RJB

REPORT AND RECOMMENDATION

Noted for March 24, 2006

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. The matter is before the court on plaintiff's failure to respond to the court's order directing plaintiff to amend his proposed complaint (Dkt # 4), which explained that it did not appear plaintiff had adequately alleged a constitutional or federal cause of action. The matter is also before the court as it appears plaintiff's claims are barred by the statute of limitations.

After reviewing the motion the record, the undersigned recommends that the Court dismiss plaintiff's complaint and causes of action.

PROCEDURAL AND FACTUAL BACKGROUND

On December 30, 2005, Plaintiff submitted a pro se civil rights lawsuit under 42 U.S.C. § 1983, naming Joseph Lehman, Secretary of the Department of Corrections (DOC), as a Defendant.

1 (Dkt. #1). In his Complaint Mr. Elmore claims that he was unlawfully detained past his
 2 earned early release date (“EERD”). Complaint at 2. According to the Complaint, Mr. Elmore was a
 3 Washington State DOC prisoner from 1994 to 1999. *Id.* at 2, ¶ 1. Plaintiff alleges he was unlawfully
 4 detained past his earned early release date (“EERD”) of December 25, 1997, and he was imprisoned
 5 by defendant until July 11, 1999, when he was released from custody of the Washington State
 6 Department of Corrections. Plaintiff seeks general damages in the amount of \$1500.00 per day that
 7 he spent in prison beyond his EERD, punitive damages, and “any other relief the court feels a need to
 8 impose.” *Id.* at 3.

9 DISCUSSION

10 The appropriate statute of limitations for a § 1983 claim is the forum state’s statute of
 11 limitations for tort actions. Wilson v. Garcia, 471 U.S. 261, 269 (1985). Washington State provides
 12 a three year statute of limitations for tort claims. RCW 4.16.080(2) (1998). Accordingly, the statute
 13 of limitations applicable to plaintiff’s § 1983 claim is three years. See, e.g., Joshua v. Newell, 871
 14 F.2d 884, 886.

15 Here, Mr. Elmore indicates that the allegations giving rise to his Civil Rights Complaint
 16 occurred when he was unlawfully detained past his earned early release date. He states that his
 17 earned early release date was December 25, 1997. Arguably his claim for release and damages arose
 18 at that time. Mr. Elmore further states that he was released from prison on July 11, 1999.
 19 Significantly, plaintiff applied for in forma pauperis status and submitted his proposed Complaint to
 20 the court on or about December 19, 2005 (the date his initial pleadings were signed), which is more
 21 than six years after his release from DOC custody and almost eight years since is EERD. Clearly, the
 22 court should dismiss his untimely claims.

23 After reviewing the merits of the complaint, the court further finds that plaintiff’s allegations
 24 based on his EERD do not appear to present a cognizable claim. have merit. A prison inmate has no
 25 constitutional right to release before expiration of his or her sentence. Greenholtz v. Inmates of
 26 Nebraska, 442 U.S. 1 (1979). Washington State appellate courts recognized an independent state
 27 created interest in amassing early release credits. In Re Galvez, 79 Wn. App 655 (1995). The
 28 REPORT AND RECOMMENDATION - 2

1 Washington State Court of Appeals, Division 1, found there to be a “limited liberty interest” in
 2 earned early release credit which requires minimal due process. In re Crowder, 97 Wn. App. 598
 3 (1999). In Dutcher the same appellate court emphasized it was proceeding under RAP 16.4, which
 4 did not require a finding of a constitutional violation but rather only a finding of unlawful restraint
 5 under state law. Dutcher, supra at p. 758 (fn. 3 and 4, *citing In re Cashaw*, 123 Wn. 2d 138 (1994)).
 6

7 The plaintiff in Cashaw filed a personal restraint petition (PRP) which challenged the actions
 8 of the Indeterminate Sentence Review Board in setting his minimum prison term to coincide with the
 9 remainder of his court-imposed maximum sentence. The Court of Appeals granted the “PRP after
 10 concluding the Board’s failure to follow its own procedural rules violated Cashaw’s due process
 11 rights.” Cashaw, supra, at p. 140. While the Washington Supreme Court affirmed the grant of the
 12 PRP, it did so on the ground that “an inmate may be entitled to relief solely upon showing the Board
 13 set a minimum term in violation of a statute or regulation.” Cashaw at p. 140. The Washington
 14 Supreme Court disagreed, however, with the Court of Appeals and found “that no due process
 15 liberty interest was created here, for the Board’s regulations imposed only procedural, not
 16 substantive, requirements.” Cashaw at p. 140. The state court affirmed the notion that “procedural
 17 laws do not create liberty interests; only substantive laws can create these interests.” Cashaw, supra
 18 at p. 145. The Washington State Supreme Court in Cashaw was careful to grant relief only on state
 19 grounds. Indeed, the State Supreme Court in Cashaw analyzed what is needed to find a state created
 20 liberty interest and found no due process violation in that case. The court stated:

21 Liberty interests may arise from either of two sources, the due process clause
 22 and state laws. Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct. 864, 868, 74 L.Ed.2d
 23 675 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir.1986), cert. denied, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987). The due process
 24 clause of the federal constitution does not, of its own force, create a liberty interest
 25 under the facts of this case for it is well settled that an inmate does not have a liberty
 26 interest in being released prior to serving the full maximum sentence. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100,
 2103, 60 L.Ed.2d 668 (1979); Ayers, 105 Wash.2d at 164-66, 713 P.2d 88; Powell,
 117 Wash.2d at 202-03, 814 P.2d 635.

27 However, as indicated above, state statutes or regulations can create due
 28 process liberty interests where none would have otherwise existed. See Hewitt, 459

1 U.S. at 469, 103 S.Ct. at 870; Toussaint, 801 F.2d at 1089; Powell, 117 Wash.2d at
 2 202-03, 814 P.2d 635. By enacting a law that places substantive limits on official
 3 decision making, the State can create an expectation that the law will be followed,
 and this expectation can rise to the level of a protected liberty interest. See Toussaint,
 801 F.2d at 1094.

4 For a state law to create a liberty interest, it must contain "substantive
 5 predicates" to the exercise of discretion and "**specific directives to the decision**
maker that if the regulations' substantive predicates are present, a particular
 6 **outcome must follow**". Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454,
 7 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989); Swenson v. Trickey, 995 F.2d
 8 132, 134 (8th Cir.), cert. denied, 510 U.S. 999, 114 S.Ct. 568, 126 L.Ed.2d 468
 (1993). **Thus, laws that dictate particular decisions given particular facts can**
create liberty interests, but laws granting a significant degree of discretion
cannot.

9 In Re Cashaw, 123 Wn 2d at 144 (emphasis added).

10 The Department of Corrections has been mandated by statute to implement a system that
 11 allows for the possibility of early release. For some inmates their release is automatic when they
 12 reach their earned early release date because they have no supervision following incarceration.
 13 Inmates who were sentenced to community placement or community custody, cannot earn this
 14 reduction in sentence. Instead, they earn a possibility of being placed on community placement or
 15 community custody at the discretion of the Department of Corrections. Their release is not
 16 automatic.

17 In Dutcher, the Court of Appeals proceeded pursuant to RAP 16.4 (Personal Restraint
 18 Petition - Grounds for Remedy). The court used a standard of review which did not require the
 19 finding of a constitutional violation. The ruling in Dutcher that the department must follow the state
 20 statutory system and consider plans on the merits does not equate to a finding of a state created
 21 liberty interest in release and the holding in Dutcher did not eliminate the departments' discretion.

22 In 1995 the United States Supreme Court examined the methodology used to determine if
 23 state laws or regulations created liberty interests in a prison context and the Court adopted a new
 24 approach. Sandin v. Conners, 515 U.S. 472 (1995). The decision in Sandin was a reaction to the
 25 practice of combing state regulations for mandatory language to find liberty interests. The refusal to
 26 investigate a proposed plan does not lead to violation of a constitutionally protected right. There is
 27 no change in the incidents of normal prison life and the inmate is held until the expiration of his
 28

1 sentence. Accordingly, it would not appear that Mr. Elmore's claims presented here present a
2 cognizable federal claim

3 Irregardless of the merits of Mr. Elmore's claims, after reviewing the matter the court finds
4 he failed to bring his EERD claim in a timely fashion. This action was commenced more than three
5 years since his claim arose or since he was reasonably aware that his civil rights may have been
6 violated by defendant's alleged actions. The court should dismiss this case based on the applicable
7 three-year statute of limitations.

8 CONCLUSION

9 For the reasons outlined above the undersigned recommends **dismissal** of plaintiff's
10 complaint and causes of action. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules
11 of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written
12 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit
14 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **March 24, 2006**, as
15 noted in the caption.

16 DATED this 2nd day of March, 2006.

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18 */s/ J. Kelley Arnold*
19 J. Kelley Arnold
20 United States Magistrate Judge
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